BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEVIN R. BRITTINGHAM	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,319
KELLY SERVICES, INC.	)	
Respondent	)	
AND	)	
	)	
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Claimant appeals the September 10, 2010, preliminary hearing Order of Administrative Law Judge Bruce E. Moore (ALJ). Claimant was denied workers compensation benefits after the ALJ determined that claimant had failed to prove that he suffered personal injury by accident which arose out of and in the course of his employment with respondent. Additionally, the ALJ found that claimant also failed to sustain his burden of proof that his need for treatment is causally related to his work injury.

Claimant appeared by his attorney, Melinda G. Young of Hutchinson, Kansas. Respondent and its insurance carrier appeared by their attorney, Kim R. Martens of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the discovery deposition of Kevin Brittingham taken December 17, 2009, with attachments; the videotaped deposition of Rodney Adams taken January 4, 2010, with attachments; the transcript of Preliminary Hearing held January 14, 2010, with attachments; the deposition of Jerold D. Albright, M.D., taken May 12, 2010, with attachments; the transcript of Preliminary Hearing held September 9, 2010; and the documents filed of record in this matter.

ISSUES

1. Did the ALJ err in concluding that claimant failed to sustain his burden of proof of personal injury by accident arising out of and in the course of his employment?

2. Did the ALJ err in concluding that claimant failed to sustain his burden of proving that claimant's need for ongoing medical treatment is causally related to his work injury?

Claimant alleges an injury to his upper and middle back on May 20, 2009, when he picked up a piece of PVC pipe. Claimant contends that his history of the accident and resulting back pain has been consistent throughout this matter. Respondent contends that claimant claims a back injury for which there were no witnesses. Claimant completed his shift and went home, telling no one of the alleged accident. Additionally, after going home, claimant felt good enough to lift concrete blocks weighing 20 pounds. While lifting those blocks, claimant suffered an injury causing his back to pop. Claimant's home injury was severe enough to cause claimant to stop working and seek medical attention. Respondent contends the incident at work did not happen, and even if it did, the evidence establishes that the incident at claimant's home caused the need for any medical treatment. Therefore, claimant should be denied benefits on this claim.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant was hired by respondent on May 11, 2009, as a temporary worker. Claimant was assigned by respondent to work at the Certainteed facility as a laborer. Claimant testified that on May 20, while working at the Certainteed facility, he lifted a piece of PVC pipe and felt a burning in the middle of his back. Claimant did not report the incident, and there were no witnesses to this incident. Claimant finished his shift and went home. While at home claimant began moving concrete blocks which weighed 20 pounds. While lifting a block, claimant experienced pain in his back and his back popped. Claimant dropped the block and went into his house to lie down. Claimant also began experiencing problems using his left arm and when turning his neck. The next morning, claimant called respondent and advised them that he had injured himself the day before. An accident report was prepared by respondent, but claimant was unable to say whether he was injured at work or at home.

Claimant was taken to the Memorial Hospital emergency room in McPherson, Kansas, where x-rays were taken and claimant was provided with muscle relaxers. CT scans of the cervical and thoracic spine were read as normal. The emergency room

records indicated that claimant was lifting pipe and felt a muscle burn. This was reported by claimant to have happened before, although no additional history was provided.

The initial emergency room records from May 21, 2009, also indicated that claimant was lifting yesterday at home and experienced a pop in his back. Claimant then experienced pain when he tried to sit back. It also hurt his neck to turn to the left, and he had difficulty lifting with or using his left arm.

Claimant was referred by respondent to John G. Fan, M.D., of the Hutchinson Clinic on June 18, 2009, for mid back and bilateral upper extremity pain. Claimant reported the work injury, while lifting the pipe, to the doctor but did not mention the incident lifting the concrete blocks at home. Claimant advised the doctor that he experienced severe pain in his back between the shoulder blades and also radiating pain into the bilateral shoulders and upper extremities with numbness, tingling and burning pain. Claimant displayed severe functional impairment and was diagnosed with mid thoracic and bilateral upper extremity pain with radiculopathy. Dr. Fan recommended an MRI of the cervical and thoracic spine. The deposition of Rodney Adams, an employee of respondent, who had also been assigned to work at Certainteed, was taken on January 4, 2010. Mr. Adams' sister was dating claimant. In June 2009, Mr. Adams witnessed claimant picking up and swinging Mr. Adams' niece, a girl who weighed about 30 pounds. This occurred several times. Claimant was also reported to have moved a tub saw weighing over 100 pounds. This saw, which was owned by Mr. Adams, was in the garage of Mr. Adams' mother.

This information was reported to Dr. Fan. When Dr. Fan met claimant on July 29, 2009, they discussed these allegations. Claimant denied the allegations and reported that his back pain was still severe. This pain interfered with claimant's daily activities and limited his bending and lifting. Dr. Fan determined that the original information provided by claimant was inaccurate. He also stated in his letter of August 4, 2009, to Kay G. Martin, an employee of respondent's insurance company, that, in his opinion, claimant had no restrictions, could return to work and needed no additional medical treatment. Dr. Fan went so far as to state that he did not believe that claimant had suffered a work-related injury.

On December 30, 2009, claimant was referred by his attorney to Jerold D. Albright, M.D., of the Prairie Star Health Center. Claimant reported a work-related injury on May 20, 2009, when he bent to pick up a piece of PVC pipe and experienced an acute onset of severe pain in his back, between his shoulder blades, with radiating pain into both shoulders and upper arms. There was no mention of the incident at home with the concrete blocks. Dr. Albright recommended an MRI of both the cervical and the thoracic spine. Dr. Albright opined that claimant's current symptoms were due to the injury suffered in May 2009. Claimant was restricted to a 10-pound limit for lifting, pushing and pulling, with limited bending and twisting. Claimant would be unable to stand for any prolonged period of time.

At the time of his deposition on May 12, 2010, Dr. Albright testified that, in his opinion, even with the added information regarding the home injury, claimant had initially injured himself at work. He acknowledged on cross-examination that a doctor's opinion is only as accurate as the information on which it was based. Dr. Albright agreed that he would be unable scientifically to determine which event, the work injury or the home injury, was more likely to have caused claimant's need for medical treatment.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

In this instance, the ALJ determined that claimant had failed to prove personal injury by accident arising out of and in the course of his employment with respondent

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[1] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2008 Supp. 44-501(a).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

and also failed to sustain his burden of proof that his need for treatment is causally related to his work injury. This Board Member agrees. Claimant failed to notify any of respondent's personnel of the alleged accident on the date it supposedly occurred. Additionally, claimant felt well enough when he went home to move several 20-pound concrete blocks. It was not until after moving those blocks that claimant began to experience the more severe symptoms in his back, shoulders and upper extremities. Additionally, the fact that claimant failed to mention the home injury to either Dr. Albright or Dr. Fan raises a suspicion as to claimant's motivation. Finally, subsequent to the alleged injury date, claimant was seen performing physical activities which appear to violate his restrictions, with no apparent difficulty.

Claimant's request for benefits depends, to a great deal, on his credibility. Here, the ALJ had the opportunity to observe claimant testify. Apparently the ALJ found claimant's credibility to be lacking. The decision to deny claimant benefits for the alleged accident on May 20, 2009, is affirmed

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that he suffered personal injury by accident on the date alleged, that the accident arose out of and in the course of his employment with respondent, and that his current need for medical treatment arose from that alleged accident. The denial of benefits by the ALJ in this matter is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bruce E. Moore dated September 10, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[5] K.S.A. 44-534a.

Dated this ____ day of December, 2010.

HONORABLE GARY M. KORTE

c: Melinda G. Young, Attorney for Claimant
Kim R. Martens, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge